Nos. 18-422, 18-726

In The Supreme Court of the United States

ROBERT A. RUCHO, et al.,

Appellants,

v.

COMMON CAUSE, et al.,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, et al.,

Appellants,

v.

O. JOHN BENISEK, et al.,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF DAVID ORENTLICHER AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

This brief amicus curiae is filed by and on behalf of David Orentlicher, Cobeaga Law Firm Professor at UNLV William S. Boyd School of Law.[2] Prof. Orentlicher teaches and writes about constitutional law and also served for six years as a state representative in the Indiana General Assembly. His recent scholarship has examined the problem of ideological partiality in the judiciary, and he submits this brief in the hope that its discussion of due process and ideological balance will be of value to the Court.

SUMMARY OF ARGUMENT

While this brief takes no position on the merits of the cases, it does present a position on the manner in which the cases should be decided. The Due Process Clause promises litigants that they will receive an impartial hearing before a neutral court. And a neutral court decides cases without any personal, political, or

[1] The parties have consented to the filing of all briefs of amici curiae. No counsel for a party authored this brief in whole or in part, and neither counsel for a party nor a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Reimbursement for printing expenses may be sought from funds made available by UNLV William S. Boyd School of Law to faculty for their professional activities.

[2] Institutional affiliation is provided for identification purposes only. This brief does not purport to present the institutional views, if any, of amicus' university.

other partiality. However, like other appellate courts, this Court brings an ideological leaning to its work. This compromises the due process principle of fairness which is critical to the resolution of any legal matter and especially matters such as political gerrymandering that go to the heart of our representative system of government. Accordingly, principles of due process require the Court to ensure that it decides these cases in an ideologically-balanced way.[3]

ARGUMENT

I. IDEOLOGICAL BALANCE AND DUE PROCESS

When the Constitution provides its fundamental guarantee of due process, it promises individuals that they will receive an impartial hearing before a neutral court.[4] And a neutral court decides cases without any personal, political, or other partiality.[5]

But this Court and other appellate courts typically are not neutral courts. They generally have either a conservative or liberal majority of Justices or judges,

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[3] Much of the argument in this brief is drawn from David Orentlicher, *Supreme Court Reform: Desirable—and Constitutionally Required*, 92 S. Cal. L. Rev. Postscript PS29 (2018).

[4] Martin H. Redish & Jennifer Aronoff, *The Real Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of Popular Constitutionalism*, 56 Wm. & Mary L. Rev. 1, 34, 36–37 (2014).

[5] Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 Fla. L. Rev. 493, 499–509 (2013).

and overall, that makes for either a conservative or liberal predilection. When a court has a liberal majority, parties promoting a conservative viewpoint will be disadvantaged. Similarly, when a court has a conservative majority, parties promoting a liberal viewpoint will be disadvantaged.

To be sure, if judging entailed a purely objective application of legal rules and principles to the facts, a jurist's ideology would not matter. But as empirical evidence demonstrates, a jurist's ideology does matter.[6] Some Justices and judges take more conservative positions, while others take more liberal positions.[7] A conservative majority will render different decisions on campaign finance, environmental regulation, or religious freedom than will a liberal majority. When this Court's decisions reflect the philosophical leanings of the Justices, and decisions can be determined by a majority on one side of the ideological spectrum, our judicial system denies an impartial hearing to parties on the other side of the ideological spectrum. And that is fundamentally unfair in a constitutional system that promises litigants due process in court.

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[6] Lee Epstein et al., *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* 103 (2013).

[7] Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 Nw. U. L. Rev. 1483, 1491 (2007). Amicus recognizes that things are more nuanced. From case to case, a judge or Justice will sometimes take more conservative positions and other times more liberal positions. Nevertheless, for many cases, either a conservative or liberal majority will prevail.

Because it is unfair for litigants to have their cases decided by an ideologically-skewed court, due process requires reforms to ensure that decisions by this Court reflect both sides of the ideological spectrum. Scholars and others have proposed a number of approaches to bring ideological balance to this Court, including changes in the judicial appointment process. The simplest path to ideological balance would be for the Court to follow the example of the jury, and render its decisions unanimously. That way, Justices on both sides of the ideological spectrum would have to support the Court's opinions.[8]

The example of juries fits well. Amicus believes that to be impartial, this Court should issue decisions that reflect the views of Justices from both sides of the ideological spectrum. Similarly, in defining the meaning of an impartial jury, this Court has required that jurors be drawn from a fair cross-section of the community.[9] As this Court also has noted, the due process standards for jury size and jury unanimity reflect the goal of group deliberation undertaken by a jury that is representative of the community.[10]

This Court itself has observed a norm of consensual decision-making for most of its history. Until 1941,

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[8] Many European high courts also decide their cases on the basis of consensus. European Parliament, *Dissenting Opinions in the Supreme Courts of the Member States* (2012), http://www.europarl.europa.eu/sdocument/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf.

[9] *Taylor v. Louisiana*, 419 U.S. 522, 526–27 (1975).

[10] *Williams v. Florida*, 399 U.S. 78, 100 (1970).

Justices typically spoke unanimously.[11] Only about 8% of cases included a dissenting opinion. Now, one or more Justices dissent in about 60% of rulings.[12] Amicus agrees with the Chief Justice that greater consensus on the court is desirable[13] and that this Court functions best "when it can deliver one clear and focused opinion."[14] More importantly, decision-making by consensus would bring this Court into conformity with the constitutional requirement of due process.[15]

Due process is important not only for the litigants before a court but also for the public generally. This is especially the case when this Court decides issues of great moment and that go to the heart of our representative system of government, such as the question of political gerrymandering in these cases. For such issues, it is critical that the public feel that the Court reaches its decisions fairly.

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[11] Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 Cornell L. Rev. 769, 771 (2015).

[12] *Id.* at 776–77.

[13] Hope Yen, *Roberts Seeks Greater Consensus on Court*, Wash. Post (May 21, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/05/21/AR2006052100678.html.

[14] Geoffrey R. Stone, *Chief Justice Roberts and the Role of the Supreme Court*, Huffington Post (May 25, 2011), https://www.huffingtonpost.com/geoffrey-r-stone/chief-justice-roberts-and_b_40277.html.

[15] Concerns about ideological balance also arise with intermediate courts of appeal so they also should adopt unanimous decision-making. While a panel of three judges often can have either three conservative or liberal members, ideological balance can be readily achieved when cases are heard *en banc*.

But concerns about the role of judicial ideology have markedly increased in recent years. A majority of Americans once expressed strong confidence in this Court. According to a July 2018 Gallup poll, only 37% do now.[16] Ensuring ideological balance would do much to restore public faith in the Court's decision-making process. As a corollary, it also would do much to defuse the highly contentious nature of judicial appointments. If people on both sides of the ideological spectrum knew their views would be reflected in Court decisions, they would not have to fight over appointments to the Court.

In addition to ensuring a fairer process, decision-making by consensus provides other important benefits. For example, it generates a more effective decision-making process. Studies on group decision-making demonstrate that better outcomes result when the decisions incorporate a range of perspectives.[17] In addition, unanimous decision-making ensures greater stability in the law. When this Court can decide cases by a majority vote, changes in the composition of the Court can lead to major changes in the Court's

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[16] Megan Brenan, *Confidence in Supreme Court Modest, but Steady*, Gallup (July 2, 2018), https://news.gallup.com/poll/236408/confidence-supreme-court-modest-steady.aspx.

[17] Alan Blinder, *The Quiet Revolution: Central Banking Goes Modern* 43 (2004); Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* 2–3 (2007); Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 Proc. Nat'l Acad. Sci. 16385 (2004).

jurisprudence. With unanimous decision-making, legal doctrine will develop along a steadier path.

II. IDEOLOGICAL BALANCE AND ORIGINAL INTENT

What would the Framers think about this? On one hand, they did not include in Article III of the Constitution a requirement for ideological balance on the Supreme Court. On the other hand, they did not reject ideological balance. Moreover, they recognized the need to amend the Constitution with a Bill of Rights that includes the Due Process Clause's guarantee of impartial courts.

The Framers' intent is consistent with this brief's due process analysis. With ideological balance, this Court would be more faithful to the Framers' design for our constitutional system. The Founding Fathers worried greatly about "factions" pursuing their self-interest to the detriment of the overall public good. Accordingly, the constitutional drafters devised a system that they thought would contain the influence of factions.[18] With regard to the judicial branch, the Framers did not expect—nor did they want—a Supreme Court that would reflect the views of only one side of the ideological spectrum. Indeed, when Alexander Hamilton explained the Constitution's appointment provisions in *The Federalist Papers*, he emphasized the need to

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[18] *The Federalist No. 10* (James Madison).

avoid nominations that reflect partiality instead of the overall public interest.[19]

The Due Process Clause and original intent both support ideological balance on this Court. As discussed in the next section, the Court's precedents are consistent with such a requirement.

III. IDEOLOGICAL BALANCE AND SUPREME COURT PRECEDENT

In previous cases, this Court has observed that constitutional concerns are not raised when a judge favors one or another ideological view.[20] Anyone with the appropriate training and experience for the judiciary will have opinions on important legal issues. According to the Court, due process prohibits partiality toward a party to a proceeding, not partiality toward a legal view that the party might advocate.[21]

But there are important reasons to distinguish Court discussions of the issue. First, the question whether an appellate court must exhibit overall ideological balance has not been decided by this Court. Rather, the Court has considered the question of partiality for individual judges. Moreover, it has done so in cases addressing other issues of judicial neutrality.

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[19] *The Federalist No. 76* (Alexander Hamilton) (discussing the appointment provisions generally).

[20] The opinion in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), provides a nice summary of this Court's discussions of the topic.

[21] *Id.* at 777–78.

In *Republican Party of Minnesota v. White*, for example, the issue before this Court was whether a state could prohibit judicial candidates from announcing their positions on issues that might come before them if elected.[22] In another case, *Tumey v. Ohio*, the issue before this Court was whether judges could have a financial stake in the outcome of their decisions.[23]

Second, this Court's reasoning is consistent with a due process argument in favor of a Court that decides cases in an ideologically-balanced way. In *Republican Party of Minnesota*, the Justices discussed the kinds of partialities that should disqualify a judge, and this Court wrote that a judge's ideological predilection is not disqualifying in the way that a personal financial interest is disqualifying. It took that view in *Republican Party of Minnesota* and earlier cases because anyone who has the experience and training that would be desirable in a judge will inevitably develop an ideological leaning.[24] And as discussed, there are benefits to having a bench of Justices with a range of ideological perspectives. But the fact that we have individual Justices with ideological leanings does not prevent us from ensuring an overall ideological balance on the Court. Under a fair reading of the Constitution, litigants

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[22] *Id.* at 768. This Court held that the prohibition violated the First Amendment. *Id.* at 788.

[23] *Tumey v. Ohio*, 273 U.S. 510, 514–15 (1927). The Court held that the judges' financial interests violated due process. *Id.* at 534.

[24] *Republican Party of Minnesota*, 536 U.S. at 777–78.

ought to be able to ensure that their cases are decided in an ideologically-balanced way.

In addition, it is difficult to identify a good reason for permitting this Court's holdings to be decided by a majority on one side or the other of the ideological spectrum. While we can point to the principle of majority rule to justify conservative or liberal control in the executive or legislative branches, popular majorities do not deserve special recognition in a judicial branch that should be guided by legal principle rather than prevailing sentiment.

IV. POTENTIAL CONCERNS WITH A REQUIREMENT OF IDEOLOGICAL BALANCE

In general, concerns about cost, efficiency, and fairness have limited policies to address judicial partiality.[25] For example, one solution is recusal of the partial judge. But if reasons for recusal are not strictly limited, litigants might clog the courts with baseless recusal motions,[26] and lawyers might exploit the rules to game the system in favor of their clients.[27] Members of this Court also have worried about strict recusal rules because there is no one who can step in for a disqualified Justice.[28]

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[25] Geyh, *supra* note 5, at 514–15.

[26] *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 890–91, 899–900 (2009) (Roberts, C.J., dissenting).

[27] *Id.* at 903 (Scalia, J., dissenting).

[28] Gabriel Serbulea, *Due Process and Judicial Disqualification: The Need for Reform*, 38 Pepp. L. Rev. 1109, 1136–38 (2011).

A requirement of unanimity avoids the concerns raised by judicial disqualification. It promotes impartiality not by removing partial Justices, but by counterbalancing their partialities. Moreover, it can be adopted by the Court on its own without the need for legislative or executive action.

Still, one might worry that a unanimity requirement would lead this Court to deadlock with some frequency and leave too many issues to be decided by the lower courts. However, a few considerations indicate that it is unlikely to do so. First, this Court has an obligation to resolve critical legal questions, and we can expect Justices to fulfill the duties of their position.

Second, decision-makers adjust their behavior to their decision-making rules. When a simple majority can prevail, people may look for simple majority positions. On the other hand, when unanimity is required, people look for positions that can generate consensus.

Empirical evidence supports this analysis. High courts operate successfully with a requirement of consensus in other countries.[29] So do juries in this country. Criminal court juries typically have twelve members, and they have to reach unanimous decisions.[30] Hung juries occur, but not very often.[31] Moreover, juries reach

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[29] European Parliament, *supra* note 8, at 17-20.

[30] State juries in Oregon are the lone exception, where a supermajority of ten out of twelve is required for most cases. Or. Const. art. I, § 11; Or. Rev. Stat. § 136.450.

[31] Studies suggest an average hung jury rate of around 6% nationwide. Paula L. Hannaford-Agor et al., *Are Hung Juries a Problem?: Executive Summary* 2 (2002).

their unanimous decisions in a setting that allows for less compromise than does a decision by a judicial bench. A criminal jury must acquit or convict.[32]

To be sure, this Court has not always required unanimous jury verdicts under the Due Process Clause, but it also has rejected non-unanimous jury verdicts when the jury size shrinks.[33] A Supreme Court with twelve members might satisfy due process with a supermajority vote of ten, but with only nine members, unanimity would be needed on many occasions to ensure ideological balance.

Of course, requirements of jury unanimity reflect the gravity of the decisions at stake. Whether a jury convicts or acquits has enormous consequences for the defendant. Just as much is at stake with this Court. Its decisions can have the same consequences for defendants when it hears criminal appeals. Other constitutional decisions also can have profound consequences for the parties and the public generally. And even with civil juries, while it is more common among the states to require supermajority rather than unanimous verdicts, unanimity is required under the federal rules of procedure.[34]

Consensus-based decision-making also works well in non-governmental settings. The American Medical

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[32] In some cases, juries can compromise if they have the option of convicting on a less serious charge.

[33] *Burch v. Louisiana*, 441 U.S. 130 (1979).

[34] Fed. R. Civ. Pro. 48(b). The parties can waive the unanimity requirement. *Id.*

Association's Council on Ethical and Judicial Affairs (CEJA) provides a useful example. CEJA develops guidelines for physicians on the full range of ethical questions in medical practice, including genetic testing, end-of-life decisions, and conflicts of interest. CEJA also hears appeals of disciplinary proceedings against physicians by state and other medical societies. CEJA has nine members who reach all of their decisions by consensus. Under its requirement of unanimity, CEJA has been able to decide its appeals and issue a comprehensive ethics code that includes guidelines on many controversial matters.[35]

One might wonder whether decision-making by consensus really would yield ideological balance. If all Justices were either conservative or liberal, then even unanimous decisions would have an ideological tilt. This is a theoretical rather than practical concern. The Martin-Quinn scores that have measured the ideological leanings of Justices since 1937 have found a mix of conservative and liberal Justices throughout the entire eight-decade period.[36]

If due process requires ideological balance, does it also require other kinds of balance? Concerns about partiality on this Court reflect concerns about ideological differences, which is not surprising. People's views

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[35] AMA Council on Ethical and Judicial Affairs, *Code of Medical Ethics* (2017). Amicus previously served for more than six years as Secretary to CEJA.

[36] Nate Silver, *Supreme Court May Be Most Conservative in Modern History*, FiveThirtyEight (Mar. 29, 2012), https://fivethirtyeight.blogs.nytimes.com/2012/03/29/supreme-court-may-be-most-conservative-in-modern-history/.

on policy questions are influenced more by their ideology than their other traits. Thus, for example, female voters care more about the political party than about the sex of candidates for political office and therefore vote their ideology rather than their sex.[37] Moreover, an important virtue of decision-making by consensus is that it ensures not only ideological balance but also balance across a range of attributes that Justices or judges bring with them to the bench.

CONCLUSION

As the principle of due process recognizes, it is not only important that a court reach the legally correct decisions, but also that it make its decisions in an impartial way. To ensure impartiality in these, and other, cases, this Court should render decisions that are based on a consensus of all nine Justices and therefore reached in an ideologically-balanced manner.

Respectfully submitted,

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[37] Kathleen Dolan, *Gender Stereotypes, Candidate Evaluations, and Voting for Women Candidates: What Really Matters?*, 67 Pol. Res. Q. 96, 98, 104 (2014).